

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMIE DALE OTTO,

Petitioner,

No. CIV S-02-0069 MCE DAD P

vs.

DIRECTOR OF THE CALIFORNIA  
DEPARTMENT OF MENTAL  
HEALTH,

FINDINGS AND RECOMMENDATIONS

Respondent.

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Petitioner is a former state prisoner who has been subsequently confined under a civil commitment. He is proceeding through counsel with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges both a March 11, 1999 finding by the Solano County Superior Court that he was a sexually violent predator pursuant to § 6600 of the California Welfare and Institutions Code and his resultant two year commitment to Atascadero State Hospital (Atascadero). He seeks relief on the grounds that he was deprived of due process under the Fourteenth Amendment by the trial court's admission of multiple-level hearsay evidence to establish that he had been twice convicted of "sexually violent offenses," an element required for a civil commitment. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner be denied habeas corpus relief.

## PROCEDURAL BACKGROUND

On March 11, 1999, petitioner was found by the Solano County Superior Court to be a sexually violent predator (hereinafter SVP) pursuant to § 6600 of the California Welfare and Institutions Code (hereinafter SVPA).<sup>1</sup> Petitioner was civilly committed to Atascadero State Hospital for two years commencing March 5, 1999, and ending on March 5, 2001. (Resp't's March 21, 2002 Mot. to Dismiss (MTD), Ex. 1.) On February 1, 2001, while petitioner was still confined pursuant to the March 5, 1999 commitment and while his appeal from that commitment was still pending in the state courts, the Solano County District Attorney filed a petition for recommitment. (*Id.*, Exs. 3 & 4.) On February 22, 2001, petitioner, represented by counsel, appeared in court and waived his right to a probable cause hearing, waived time for trial on the recommitment petition and agreed to remain at Atascadero State Hospital pending the outcome of his appeal. (*Id.*, Ex. 5.)<sup>2</sup> At subsequent hearings conducted on September 6, 2001, October 10, 2001 and January 23, 2002, petitioner again waived time and requested that the probable cause hearing and trial be continued until after his recovery from a scheduled surgery. (*Id.*, Exs. 6, 7 & 8.) As of March 21, 2002, when respondent filed a motion to dismiss this action, trial on the recommitment petition was set for July 24, 2002. (*Id.*, Ex. 8.)<sup>3</sup>

In his March 21, 2002 motion to dismiss, respondent argued that petitioner was no longer in custody within the meaning of 28 U.S.C. §§ 2241(c)(3) and 2254(a) when he filed the

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<sup>1</sup> A sexually violent predator is defined in California law as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600(a)(1).

<sup>2</sup> Pursuant to California law, a probable cause hearing is held after a petition for commitment is filed to determine "whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." Cal. Welf. & Inst. Code § 6602(a).

<sup>3</sup> This court has independently verified that petitioner currently remains a patient at Atascadero. The basis for petitioner's continuing commitment is not known to the court but appears irrelevant to the disposition of the pending petition.

1 instant petition on January 10, 2002.<sup>4</sup> The motion to dismiss was denied by order dated January  
 2 27, 2003. This court found that petitioner was in custody by virtue of his involuntary  
 3 confinement in Atascadero State Hospital when he filed his federal habeas corpus petition and  
 4 that the expiration of the challenged civil commitment did not defeat federal jurisdiction over  
 5 this action.

#### 6 FACTUAL BACKGROUND<sup>5</sup>

7 On October 9, 1991, Jimmie Dale Otto pled no contest to four  
 8 felony counts of lewd and lascivious conduct on a child less than  
 9 14 years of age (Pen. Code, § 288, subd. (a)). The factual basis for  
 10 the plea was “contained in the police report.” The four counts  
 11 involved four different victims – K.W., M.S., A.S., and D.S. Dr.  
 12 Charlene Steen, appointed to examine Otto, stated in her report,  
 13 which was attached to the presentence report, that Otto admitted he  
 14 touched K.W. under her pants on one occasion, tickling her  
 15 buttocks and “private areas” without any sexual intent. Otto also  
 16 told the probation officer he tickled K.W. on her bottom under her  
 17 panties. He denied having molested any of the S. children, and  
 18 stated he had pled no contest because his attorney told him this was  
 19 the best possible deal. On December 13, 1991, Otto was sentenced  
 20 to 12 years in state prison. On February 27, 1998, the People filed  
 21 a petition seeking Otto’s commitment as an SVP. Otto moved in  
 22 limine to exclude “police or other hearsay reports” and prevent  
 23 psychological evaluators from relying on them. The trial court  
 24 denied the motion. Otto waived his right to a jury trial. Both the  
 25 People and Otto presented experts who reviewed and relied on the  
 26 presentence report and other documents. As relevant here, the  
 People’s three experts<sup>6</sup> concluded two of Otto’s prior offenses

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19 <sup>4</sup> Title 28 U.S.C. § 2241(c)(3) limits jurisdiction to persons who are “in custody in  
 20 violation of the Constitution or laws or treaties of the United States.” Title 28 U.S.C. § 2254(a)  
 21 limits federal jurisdiction to “an application for a writ of habeas corpus in behalf of a person in  
 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
 violation of the Constitution or laws or treaties of the United States.”

22 <sup>5</sup> The following summary is drawn from People v. Otto, 26 Cal. 4th 200, 203-04 (2001),  
 23 in which the California Supreme Court rejected petitioner’s arguments on appeal from his  
 24 commitment to Atascadero State Hospital and held that the use of presentence and probation  
 reports to prove the details of the predicate offenses in a sexually violent predator civil  
 commitment hearing does not violate a defendant’s due process rights.

25 <sup>6</sup> At the People’s request, the trial court admitted the abstract of judgment and  
 26 presentence report from Otto’s felony convictions for molesting K.W., M.S., A.S., and D.S., a  
 1991 evaluation by Dr. Steen that accompanied the presentence report, the written psychological

involved substantial sexual conduct.<sup>7</sup> Indeed, although one defense expert, who did not testify, opined in his written report Otto was not likely to engage in sexually violent criminal behavior as a result of his diagnosed mental disorder, he also concluded Otto had been convicted of sexually violent predatory offenses against two or more victims. The other defense expert declined to offer an opinion regarding this latter issue, although he noted in his written report “the descriptions of the crimes strongly suggest that they included ‘sexual violence.’”<sup>8</sup> The trial court found beyond a reasonable doubt that Otto was an SVP within the meaning of section 6600, and ordered him committed to Atascadero State Hospital or other secure facility for two years.

The Court of Appeal affirmed, and denied Otto’s subsequent petition for rehearing. We granted Otto’s petition for review, and limited the issues to whether section 6600(a)(3) allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule, and if so, whether reliance on this evidence violates a defendant’s right to due process.

## ANALYSIS

### I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085.

However, a “claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so

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evaluations of Dr. Zinik, Dr. Jackson, and Dr. Sreenivasan, and the notification of evaluation as an SVP.

<sup>7</sup> In addition to this conclusion which is at issue here, the People’s experts relied on additional factors, such as Otto’s admission he had molested his minor stepchildren (not the same victims as those in the predicate offenses) and his substance abuse problem, in opining Otto satisfied the criteria for the Sexually Violant Predators Act (SVPA), section 6600 et seq.

<sup>8</sup> At Otto’s request, the trial court admitted the written psychological evaluations of Dr. Halon and Dr. Owen.

1 infects the entire trial that the resulting conviction violates the defendant's right to due process."  
2 Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th  
3 Cir. 1980)). See also Lisenba v. California, 314 U.S. 219, 236 (1941); Henry v. Kernan, 197  
4 F.3d 1021, 1031 (9th Cir. 1999). In order to raise such a claim in a federal habeas corpus  
5 petition, the "error alleged must have resulted in a complete miscarriage of justice." Hill v.  
6 United States, 368 U.S. 424, 428 (1962). See also Henry, 197 F.3d at 1031; Crisafi v. Oliver,  
7 396 F.2d 293, 294-95 (9th Cir. 1968). Habeas corpus cannot be utilized to try state issues de  
8 novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

9 Because this action was filed after April 26, 1996, the provisions of the  
10 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are applicable. See Lindh v.  
11 Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003).  
12 Section 2254(d) as amended by the AEDPA, sets forth the following standards for granting  
13 habeas corpus relief:

14 An application for a writ of habeas corpus on behalf of a  
15 person in custody pursuant to the judgment of a State court shall  
16 not be granted with respect to any claim that was adjudicated on  
the merits in State court proceedings unless the adjudication of the  
claim -

17 (1) resulted in a decision that was contrary to, or involved  
18 an unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable  
20 determination of the facts in light of the evidence presented in the  
State court proceeding.

21 28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v.  
22 Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

## 23 II. Jurisdiction

24 As explained above, this court has previously determined, in connection with  
25 respondent's motion to dismiss, that petitioner was "in custody" within the meaning of 28 U.S.C.  
26 §§ 2241(c)(3) and 2254(a) when he filed the instant petition on January 10, 2002. More recently,

1 the Ninth Circuit Court of Appeals has had the opportunity to address the question of under what  
2 circumstances the claims of petitioner's challenging civil commitments such as that at issue here  
3 are rendered moot by the expiration of the term of commitment. In addition, the Ninth Circuit  
4 has addressed whether a petitioner who does not file a federal habeas petition until after a term of  
5 civil commitment has expired has standing to collaterally attack that underlying civil  
6 commitment. Below the undersigned will briefly address these issues in the context of the  
7 pending petition, concluding that petitioner has standing to bring his claims and that they have  
8 not been rendered moot.

9 In Hubbart v. Knapp, 379 F.3d 773 (9th Cir. 2004), the government argued that  
10 the case was moot because the original term of commitment under the SVPA which was being  
11 challenged by petitioner had expired and he was confined pursuant to a new two year term. (Id.  
12 at 777.) The court rejected the argument holding that the petitioner's challenge was not moot  
13 because his claims were "capable of repetition yet evading review." (Id.) In this regard, the  
14 court found that the "capable of repetition" component of the analysis was satisfied because the  
15 petitioner had already been confined pursuant to a second commitment proceeding and a third  
16 petition to commit him was pending. (Id. at 777-78 & n.1.) The court also concluded that the  
17 claimed harm evaded review because petitioner's two-year term was too short to be fully litigated  
18 through the federal appellate process before the term expired. (Id. at 778.)

19 The same is true in this case. At the time petitioner filed the instant petition, the  
20 state had filed a second SVPA commitment proceeding against him. This court has verified that  
21 petitioner remains a patient at Atascadero. Therefore, there is a reasonable expectation that  
22 petitioner will be subject to continued commitment in the future. Further, petitioner could not  
23 pursue his claims through the federal appellate process before his two-year term expired. Thus,  
24 like the situation presented to the court in Hubbard, petitioner's claims are capable of repetition  
25 yet evading review. Therefore, this action has not been rendered moot.

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1 With respect to standing, in Jackson v. Cal. Dept. of Mental Health, 399 F.3d  
2 1069 (9th Cir. 2005), the court recently held that a petitioner lack standing to challenge an  
3 expired SVPA confinement term where he had voluntarily recommitted himself.<sup>9</sup> The court  
4 concluded that the decision in Hubbard did not compel a different result because Jackson's term  
5 had expired before he filed his habeas petition. (Id. at 1072.) Most importantly, the court found  
6 that because no further recommitment petition had been filed by the state and the petitioner was  
7 in custody only because he had voluntarily recommitted himself, his confinement was not fairly  
8 traceable to any action by the state. (Id. at 1074-75.) Because the petitioner had failed to  
9 demonstrate that he was suffering harm associated with the SVPA confinement order, he was  
10 found to lack standing to challenge the state court's jurisdiction.

11 However, petitioner's case is factually distinguishable from that presented in  
12 Jackson. Here, the state filed a second recommitment proceeding prior to the expiration of  
13 petitioner's first term of commitment. Although petitioner voluntarily waived time for trial in  
14 that matter, he did not voluntarily recommit himself and there is no indication in the record that  
15 petitioner would have remained at Atascadero State Hospital if the state had not filed a second  
16 petition for recommitment. Further, petitioner was required under California law to remain in  
17 custody under the initial commitment order until the recommitment petition was tried. See Cal.  
18 Welf. & Inst. Code § 6604 (a "person shall not be kept in actual custody longer than two years  
19 unless a subsequent extended commitment is obtained from the court incident to the filing of a  
20 petition for extended commitment") and § 6601.5 (if the judge determines that a petition for  
21 commitment supports a finding of probable cause, "the judge shall order that the person be  
22 detained in a secure facility until a hearing can be completed"). For these reasons, in this case  
23 petitioner's continued confinement was "directly traceable" to the state's second commitment  
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25 <sup>9</sup> In order to have standing to bring a claim, a litigant must have suffered "(1) an 'injury  
26 in fact' that is (2) 'fairly traceable' to the state court's commitment order that he challenges, and  
(3) that is 'likely [to be] redressed by a favorable decision.'" Jackson, 399 F.3d at 1071 (quoting  
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)).

petition. Petitioner has also suffered an “injury in fact” (continued commitment) which would be addressed by a favorable decision on his claims. Thus, petitioner has satisfied all of the requirements to confer on him standing to present his claims to this court. Jackson, 399 F.3d at 1071-75. Accordingly, below the court will address petitioner’s claims on the merits.

### III. Petitioner’s Claims

Petitioner alleges that he was deprived of due process under the Fourteenth Amendment by the trial court’s admission of multiple-level hearsay evidence (the probation report reflecting the victims’ descriptions of the offenses) to prove that he had been twice convicted for “sexually violent offenses,” which is an element required for a civil commitment.<sup>10</sup> Petitioner claims that admission of this evidence violated his right to due process in that (1) he was deprived of his right to confront and cross-examine the witnesses against him as guaranteed by Specht v. Patterson, 386 U.S. 605, 609-10 (1967); (2) the evidence admitted over his objection was of a type that could not be admitted in a criminal trial as explained by the Supreme Court in Idaho v. Wright, 497 U.S. 805 (1990); and (3) the result was to relieve the state of its

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<sup>10</sup> At the time of petitioner’s commitment, Cal. Welf. & Inst. Code § 6600(a) (3) provided:

Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. *The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health.* Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

(italics added). The italicized portion of this code section is placed at issue by the habeas petition pending before the court.

1 burden to prove beyond a reasonable doubt, or at least by clear and convincing evidence, all of  
2 the facts necessary to justify his confinement, contrary to the holdings in Addington v. Texas,  
3 441 U.S. 418, 425 (1979) and Foucha v. Louisiana, 504 U.S. 71 (1992). (Pet. at 3-4.)

4           The California Supreme Court thoroughly considered and addressed petitioner's  
5 argument that the admission of hearsay statements in an SVP proceeding violated his due process  
6 right to confrontation and the concomitant right to be convicted only upon reliable evidence. See  
7 People v. Otto, 26 Cal. 4th 200, 209-215 (2001). At the outset the California Supreme Court  
8 acknowledged that a defendant in an SVP proceeding is entitled to due process protections. Otto,  
9 26 Cal. 4th at 209 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). Applying the relevant  
10 factors to determine what process is due in this context, the court held petitioner's right to due  
11 process had not been violated by the admission of hearsay at his civil commitment proceeding.  
12 (Id. at 210-15.) In this regard, the court first noted that the private interests affected by the  
13 official action are the significant limitations on the defendant's liberty, the stigma of being  
14 classified as an SVP, and subjection to unwanted treatment. Id. at 210. Next, the court  
15 considered the risk of an erroneous deprivation of such interests through the procedures used. Id.  
16 The court concluded that the victim hearsay statements must contain "special indicia of reliability  
17 to satisfy due process" but also observed that under the circumstances generally present in an  
18 SVP proceeding, this requirement would almost always be met. Id. According to the California  
19 Supreme Court, the most critical factor demonstrating the reliability of the victim hearsay  
20 statements is that the defendant was convicted of the crimes to which the statements relate. Id. at  
21 211. Because the SVPA requires conviction of a sexually violent offense against two or more  
22 victims, some portion, if not all, of the alleged conduct will have been already either admitted in  
23 a plea or found true by a trier of fact after trial. Id. Additionally, the court noted that  
24 consideration of hearsay statements contained in presentence reports is not unique to the SVPA.  
25 Id. at 212-14. The reliability of such statements withstands scrutiny, the court suggested, because  
26 by statute criminal defendants must be provided the opportunity to review and challenge

1 inaccuracies contained in such reports. Id. at 212. For all these reasons, the California Supreme  
2 Court concluded that there was no deprivation of the defendant's rights as a result of the reliance  
3 on the hearsay statements. Id. at 214.

4           The California Supreme Court also found that reliance on victim hearsay  
5 statements in a SVP proceeding does not deny the defendant any right of confrontation, noting  
6 that there is no right to confrontation under the state and federal Confrontation Clause in civil  
7 proceedings. Id. at 214. The court concluded that under the SVPA, a defendant's due process  
8 right to confront witnesses is preserved because the defendant has the right to cross-examine any  
9 prosecution witness who testifies in connection with the underlying criminal charges. Id. Next,  
10 the court found that the government's interest in protecting the public from those who are  
11 dangerous and mentally ill could potentially be impeded by requiring live victim testimony,  
12 noting that the SVP proceeding occurs at the end of the defendant's sentence, which may be years  
13 after the events in question. Id. at 214. Finally, the California Supreme Court concluded that  
14 reliance on hearsay evidence in SVP proceedings does not impede the defendant's interest in  
15 being informed of the nature, grounds, and consequences of the commitment proceeding nor  
16 prevents the defendant from presenting his side of the story before a responsible government  
17 official. Id. at 215.

18           At the outset it must be noted that the United States Supreme Court has not  
19 considered the question whether a defendant must be afforded the right to confront and cross-  
20 examine witnesses before he may be involuntarily committed pursuant to a state's sexually  
21 violent predator law. For this reason, it may not be said that the California Supreme Court's  
22 decision in Otto was contrary to, or an unreasonable application of, clearly-established federal  
23 law. See Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); Brewer v. Hall, 378 F.3d  
24 952, 955 (9th Cir. 2004). Moreover, to the extent the United States Supreme Court has addresses  
25 the issue in somewhat similar contexts the decision of the California Supreme Court is not an  
26 objectively unreasonable application of federal law in this area.

1           The United States Supreme Court has held that involuntary commitment under a  
2 sexually violent predator act is not a "criminal" proceeding, but is civil in nature. Kansas v.  
3 Hendricks, 521 U.S. 346 (1997). The Supreme Court has also held that civil commitments  
4 involve a significant deprivation of liberty and therefore mandate due process protections.  
5 Foucha, 504 U.S. at 80 (involuntary commitment of insanity acquittee); Jackson v. Indiana, 406  
6 U.S. 715, 738-39 (1972) (involuntary commitment of criminal defendant who was incompetent  
7 to stand trial). The Sixth Amendment right to confrontation is limited by its express terms to  
8 criminal defendants. U.S. Const., Amend. VI. Therefore, as found by the California Supreme  
9 Court, in civil proceedings the right to confront and cross-examine witnesses is grounded in the  
10 Due Process Clause and not in the Sixth Amendment. See Austin v. United States, 509 U.S. 602,  
11 608 n.4 (1993) (Confrontation Clause does not apply in civil cases). In analogous circumstances,  
12 the United States Supreme Court has held that in parole revocation proceedings due process does  
13 not requires confrontation and cross-examination of adverse witnesses if the hearing officer finds  
14 good cause for not allowing confrontation. Morrissey v. Brewer, 408 U.S. at 489. Likewise, in  
15 Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court held that one's right to due process  
16 was not violated by the use of documentary substitutes for live evidence at a probation revocation  
17 hearing. Id. at 782 n.5 ("[W]e emphasize that we did not in Morrissey intend to prohibit use  
18 where appropriate of the conventional substitutes for live testimony, including affidavits,  
19 depositions, and documentary evidence.") The California Supreme Court's detailed finding of  
20 good cause for the use of documentary evidence in SVP civil commitment proceedings is a  
21 reasonable application of these United States Supreme Court holdings.<sup>11</sup>

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23           <sup>11</sup> In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the  
24 Confrontation Clause bars the state from introducing into evidence in a criminal proceeding  
25 out-of-court statements which are testimonial in nature unless the witness is unavailable and the  
26 defendant had a prior opportunity to cross-examine the witness, regardless of whether such  
statements are deemed reliable. Id. at 68-69. As discussed above, in Otto the California  
Supreme Court concluded that for use in an SVP proceeding the victim hearsay statements must  
"contain special indicia of reliability to satisfy due process." 26 Cal. 4th at 210. Because  
Crawford requires that there be a right to in-court confrontation as opposed to a judicial finding

1 The cases cited by petitioner do not dictate a contrary result. In Specht v.  
 2 Patterson, 386 U.S. 606 (1967), the defendant was convicted but not sentenced under one statute  
 3 and was thereafter sentenced under the Colorado Sex Offenders Act for an indeterminate term  
 4 without notice and a full hearing. The Colorado Sex Offenders Act did not make commission of  
 5 a specified crime the basis for sentencing, but made one conviction the basis for commencing  
 6 another proceeding to determine whether a person constituted a threat of bodily harm to the  
 7 public or was an habitual offender and mentally ill, which was a new finding of fact that was not  
 8 an ingredient of offense charged. Thus, Specht was subjected to a sentence of up to life  
 9 imprisonment after being convicted of an offense with a statutory maximum sentence of ten  
 10 years. Id. at 607. The Supreme Court indicated that, in view of the consequences, the sentencing  
 11 proceedings amounted to a new criminal charge against the defendant. Id. at 610. Accordingly,  
 12 the court held that a defendant in such a circumstance is entitled to a full panoply of due process  
 13 rights, including the right to confront witnesses, when a sentencing proceeding results in an  
 14 additional criminal conviction. 386 U.S. at 610.<sup>12</sup>

15 Here, on the contrary, petitioner was not subjected to increased criminal  
 16 punishment as a result of his commitment under the SVPA. As discussed above, petitioner's  
 17 commitment to Atascadero State Hospital was pursuant to a civil commitment and was not a

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 19 of reliability, it might be argued that the use of presentence reports in SVP proceedings violates a  
 20 sex offender's right to confrontation. However, this court concludes that the holding in Crawford  
 21 does not apply in the context of the SVPA. Nothing in Crawford extended the Sixth Amendment  
 22 Confrontation Clause to civil litigants, including those named as defendants in SVP proceedings.  
 23 Further, the decision in Crawford did not expressly nor impliedly modify or overrule existing law  
 concerning a civil litigant's due process right to confront witnesses. Thus, the opinion of the  
 California Supreme Court that the use of hearsay evidence to prove that petitioner had been twice  
 convicted for "sexually violent offenses" is also not contrary to or an unreasonable application of  
 the Supreme Court's decision in Crawford.

24 <sup>12</sup> One court has observed that the decision in Specht "is a precursor of Apprendi v. New  
 25 Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), which hold that facts  
 26 increasing the statutory maximum punishment must be proved, to the jury's satisfaction, beyond a  
 reasonable doubt, using the procedures normally employed at a trial--which per Specht includes  
 the opportunity to confront and cross-examine one's accusers in the flesh." Szabo v. Walls, 313  
 F.3d 392, 398-99 (7th Cir. 2002).

1 criminal punishment. See Hendricks, 521 U.S. at 361-62 (holding that involuntary confinement  
2 pursuant to the Kansas Sexually Violent Predator Act was not punitive, thus precluding a finding  
3 of any double jeopardy or ex post facto violation). For these reasons, the decision of the  
4 California Supreme Court rejecting petitioner's claim in this regard is not contrary to or an  
5 unreasonable application of Specht.<sup>13</sup>

6 Finally, petitioner claims that the use of hearsay evidence at his commitment  
7 proceeding relieved the state of its burden to prove his SVP status "beyond a reasonable doubt, or  
8 at least by clear and convincing evidence," contrary to the holdings in Addington v. Texas and  
9 Foucha v. Louisiana. (Pet. at 4.) In Addington v. Texas, 441 U.S. 418 (1979) the Supreme Court  
10 determined that to meet due process demands, the standard for use in commitment for mental  
11 illness must be proof greater than the preponderance of evidence standard applicable to other  
12 categories of civil cases and must be no less than clear and convincing evidence but that the  
13 reasonable-doubt standard was not constitutionally required. 441 U.S. at 425. Similarly, in  
14 Foucha, the Supreme Court held that "the State must establish insanity and dangerousness by  
15 clear and convincing evidence in order to confine an insane convict beyond his criminal  
16 sentence, when the basis for his original confinement no longer exists." 504 U.S. at 86. Having  
17 determined that due process was not violated by the reliance on hearsay evidence at his civil  
18 commitment hearing, petitioner's argument in this regard must fail. There is no indication that  
19 the documentary evidence with respect to his prior sexually violent predatory offenses admitted  
20 at petitioner's commitment proceeding did not rise to the appropriate level of proof required to  
21 support a civil SVP commitment.

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23 <sup>13</sup> Likewise, petitioner's argument that the hearsay evidence admitted to support his civil  
24 commitment was "of a type that could not be admitted in a criminal trial," in violation of Idaho v.  
25 Wright (Pet. at 3-4) must also be rejected. In that case the Supreme Court held that the hearsay  
26 statements of the child victim admitted against petitioner at his trial on criminal charges lacked  
the particularized guarantees of trustworthiness required for admission under the Confrontation  
Clause. Idaho v. Wright, 497 U.S. 805, 818 & 827 (1990). Again, because petitioner's civil  
commitment proceeding was not a criminal prosecution the holding in Wright is not applicable.

1 For all of the reasons explained above, this court concludes that the decision of  
2 the California Supreme Court that the use of hearsay evidence at petitioner's civil commitment  
3 hearing under the SVPA did not violate due process is neither contrary to or an unreasonable  
4 application of federal law.

5 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for  
6 a writ of habeas corpus be denied.

7 These findings and recommendations are submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
9 days after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
12 shall be served and filed within ten days after service of the objections. The parties are advised  
13 that failure to file objections within the specified time may waive the right to appeal the District  
14 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: April 28, 2005.

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18 DALE A. DROZD  
19 UNITED STATES MAGISTRATE JUDGE

20 DAD:8:otto69.hc  
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